

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID SUTHERLAND,

Plaintiff-Appellant,

v

POWERSPORTS OF MONROE, L.L.C., d/b/a  
RAY'S POWERSPORTS and d/b/a ATOMIC  
POWERSPORTS, and POWERSPORTS OF  
BURTON, L.L.C., d/b/a GREAT LAKES  
POWERSPORTS,

Defendants-Appellees.

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UNPUBLISHED

March 6, 2012

No. 300790

Monroe Circuit Court

LC No. 10-028369-CZ

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants under MCR 2.116(C)(10). We reverse.

Plaintiff entered into a four-year employment agreement with defendant Powersports of Monroe, a motorsport vehicle dealership, under which plaintiff agreed to work as the general manager of the dealership for an annual salary of \$100,000, plus an annual bonus based on the net income of the company. The agreement was effective November 14, 2005, for a period of four years, and it provided for a \$50,000 "termination payment" if plaintiff were terminated without cause. In October 2006, at defendants' request, plaintiff stopped working at the Powersports of Monroe dealership and began working at the Powersports of Burton dealership, which was owned by the same entity. Plaintiff continued to receive the salary he was earning at the Monroe dealership, and no new written contract was executed between the parties when plaintiff began working at the Burton dealership. Plaintiff's salary was reduced in April 2008 and again in June 2009. On August 20, 2009, plaintiff received a letter from Powersports of Monroe stating that, pursuant to the employment agreement, his employment would terminate on November 14, 2009, but that he "shall cease reporting to work as of August 20, 2009." The letter stated that plaintiff "shall be entitled to receive all salary and benefits to which [he is] entitled under the Employment Agreement until the Termination Date."

Plaintiff alleged that defendants failed to pay him any salary after August 29, 2009, despite the letter's assurance that he would be paid according to the terms of the employment

agreement. Plaintiff also alleged that he was owed back-pay because the salary decreases in April 2008 and June 2009 breached the agreement. In addition, plaintiff claimed that he was entitled to the \$50,000 “termination payment” according to the terms of the agreement because his employment was terminated early, without cause

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that it was undisputed that plaintiff received a total of \$514,493 in compensation during the four-year term of the contract. Defendants argued that this amount exceeded the \$400,000 in salary and approximately \$13,000 in bonuses to which plaintiff was entitled under the agreement. In response, plaintiff argued that defendants were not entitled to summary disposition because a question of fact existed with respect to whether the parties had a separate, unwritten agreement for the payment of commissions. Plaintiff contended that any payment of commissions pursuant to the unwritten agreement could not be used to satisfy defendants’ obligation to pay plaintiff’s salary according to the terms of the employment agreement. Plaintiff also argued that the April 2008 salary reduction was invalid because it was not implemented in writing as required by the contract and the June 2009 salary reduction was invalid because he agreed to it under duress and there was a lack of consideration for the modification of the agreement.

This Court reviews de novo a trial court’s decision regarding a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A motion for summary disposition under MCR 2.116(C)(10) should be granted if the pleadings, affidavits, and other documentary evidence, when viewed in the light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.* (citation and quotation marks omitted). When considering a motion for summary disposition under MCR 2.116(C)(10), the trial court is not permitted to assess credibility or to determine facts. *Skinner*, 445 Mich at 161.

Having reviewed the record that was before the trial court, we conclude that the trial court erred in finding that no genuine issue of material fact existed with respect to whether plaintiff was paid his salary according to the terms of the employment agreement. Plaintiff supported his response to defendants’ motion with deposition testimony that the parties had a verbal agreement for the payment of commissions. Plaintiff’s testimony indicated that, for at least some of the years he was employed with defendants, the amount of money identified, by way of tax returns, as paid by defendants to plaintiff represented commissions in addition to salary. Defendants argue that, even subtracting the “spiffs” (or certain commissions) designated on the tax returns as “1099” income, plaintiff received more than he was entitled to under the original employment agreement. However, plaintiff’s testimony indicated that the tax returns represented more commission money than simply those monies labeled as “spiffs” by defendants at the deposition and designated as “1099” income on the returns. Defendants have not, at this stage, adequately countered this evidence. Plaintiff’s deposition testimony created a genuine issue of material fact with respect to whether a separate agreement existed for the payment of commissions and, thus, whether plaintiff was properly paid his salary under the employment agreement.

Because the alleged commission structure was tied to the alleged April 2008 and June 2009 modifications to the employment agreement, the trial court must revisit these modifications on remand. The trial court must also determine whether defendant's actions amounted to an early termination such that the early-termination provision of the employment agreement applied.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Pat M. Donofrio